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Friendly Skies, Unfriendly Terms: Class Action Waivers and Force Majeure Clauses in Airline Contracts of Carriage

Grant Glazebrook

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Cover Page Footnote

J.D., Northwestern Pritzker School of Law, 2023; B.A. Northwestern University, 2020. Thank you to Professor Max Schanzenbach for his thorough feedback and guidance and to all the editors at JILB for their meticulous edits. Thank you always to my parents for their unconditional love and unyielding support.

Friendly Skies, Unfriendly Terms: Class Action Waivers and Force Majeure Clauses in Airline Contracts of Carriage

*Grant Glazebrook**

Abstract:

The airline contract of carriage. These unassuming bits of language govern the relationship between passengers and their airlines. Over the past three years, a new term has sprouted in these agreements: the class action waiver. Before March 2020, only two of the ten largest United States-based airlines' contracts of carriage had class action waivers. But as of April 2023, eight now have class action waivers. Why have airlines quickly adopted these copycat terms? What are the implications of this new contractual trend for flyers, airlines, and regulators? This note aims to contribute to the scholarship around these questions in three ways.

First, this note tracks the development of class action waivers and force majeure clauses in airline contracts of carriage between 2020 and 2023. Second, it evaluates the enforceability of existing class action waivers in airline contracts of carriage and outlines possible defenses and challenges, including Airline Deregulation Act pre-emption and unconscionability. Third, it compares the United States' current system for adjudicating airline-passenger disputes with a Passenger Bill of Rights system, as well as regulatory regimes in Canada, Germany, and the United Kingdom. To conclude, it proposes a system of private alternative dispute resolution modeled after the United Kingdom's as a possible alternative to the United States's current litigation-focused system. This solution could help airline defendants avoid classwide liability and its associated costs while ensuring that passengers receive a viable opportunity to obtain redress.

* J.D., Northwestern Pritzker School of Law, 2023; B.A. Northwestern University, 2020. Thank you to Professor Max Schanzenbach for his thorough feedback and guidance and to all the editors at JILB for their meticulous edits. Thank you always to my parents for their unconditional love and unyielding support.

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I. INTRODUCTION

Airline contracts of carriage (CCs) typically contain an “involuntary refund” provision that requires the carrier to refund a passenger’s fare at the passenger’s request if it cancels a flight.¹ This simple default term complies with Department of Transportation (DOT) regulatory requirements and creates an alternative obligation for the airline if it fails to provide a passenger with the agreed-upon transportation.² Normally, involuntary refunds are uncontroversial. In March 2020, the airline industry was anything but normal. As air travel demand plummeted during the pandemic and airlines cancelled flights, they did not have the cash to meet consumers’ refund demands. Many issued credits for future travel in lieu of the contractually required cash refunds,³ taking out interest-free loans with passengers’ money.⁴ This action helped airlines stay afloat during a unique crisis, but it breached their CCs and tied up consumers’ cash. Frustrated flyers sued en masse. As of this writing, at least six of the ten largest U.S. carriers,⁵ and many large international carriers,⁶ have faced class action

¹ See, e.g., *Conditions of Carriage: Involuntary Refunds*, AM. AIRLINES: LEGAL, PRIVACY, & COPYRIGHT (Revised Apr. 4, 2023), <https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp>; *Rule 22(A): Involuntary Refunds*, DELTA AIRLINES: DOMESTIC GENERAL RULES TARIFF 23 (Revised Apr. 13, 2021), <https://www.delta.com/content/dam/delta-www/pdfs/dl-dgr-master-13apr21.pdf>; *Rule 27(A): Ticket Refunds – Involuntary*, UNITED AIRLINES: CONTRACT OF CARRIAGE DOCUMENT (Revised Nov. 8, 2021), <https://www.united.com/en/us/fly/contract-of-carriage.html>; *Rule 37(c): Cancellations*, JETBLUE AIRWAYS CONTRACT OF CARRIAGE 55 (Revised Mar. 8, 2023), https://www.jetblue.com/magnoliapublic/dam/ui-assets/p/contract_of_carriage.pdf; *Rule 9(a): Service Interruptions: Failure to Operate as Scheduled*, SOUTHWEST AIRLINES CO. CONTRACT OF CARRIAGE – PASSENGER 50 (Revised Dec. 29, 2022), <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf>; *Rule 17(E): Involuntary Refunds*, ALASKA AIRLINES, INC. CONTRACT OF CARRIAGE (Revised Jan. 19, 2023), <https://www.alaskaair.com/content/legal/contract-of-carriage/english-COC>.

² See 14 C.F.R. § 259.5 (2019).

³ See Harriet Baskas, *If you received travel credit or a voucher for a canceled trip last year, it’s time to read the fine print*, NBC NEWS (Mar. 19, 2021, 3:35 PM), <https://www.nbcnews.com/business/travel/if-you-received-travel-credit-or-voucher-canceled-trip-last-n1261558>

⁴ U.S. airlines currently hold about \$10 billion of passengers’ money in the form of flight vouchers. *Id.*

⁵ See, e.g., *Rudolph v. United Airlines*, 519 F.Supp. 3d 438 (N.D. Ill. 2021); *Ward v. Am. Airlines*, 498 F.Supp. 3d 909; *Daniels v. Delta Air Lines, Inc.*, No. 1:20-cv-01664-ELR, (N.D. Ga. Apr. 17, 2020) (Bloomberg Law, Court Dockets); *Hill v. Spirit Airlines, Inc.*, No. 20-60746-CIV-ALTMAN/Hunt, 2020 U.S. Dist. LEXIS 176824 (S.D. Fla. Sep. 23, 2020); *In re Frontier Airlines Litig.*, No. 20-cv-1153-PAB-KLM, 2021 U.S. Dist. LEXIS 172895 (D. Colo. Sep. 13, 2021); *Bombin v. Southwest Airlines*, No. 5:20-cv-01883-JMG, 2021 U.S. Dist. LEXIS 58862 (E.D. Pa. Mar. 29, 2021).

⁶ See, e.g., *Ide v. British Airways PLC*, No. 20-CV-3542 (JMF), 2021 U.S. Dist. LEXIS 58192 (S.D. N.Y. Mar. 26, 2021); *Maree v. Deutsch Lufthansa*, No. SACV 20-885-MWF (MRWx), 2021 U.S. Dist. LEXIS 190145; *Bugarin v. All Nippon Airways*, 513 F.Supp. 3d 1172 (N.D. Cal. 2021); *Daversa-Evyradis v. Norwegian Air*, No. EDCV 20-767-JGB (SPx), 2020 U.S. Dist. LEXIS 173854 (Sep. 17, 2020); *Herrera v. Cathay Pac. Airways*

suits for their failure to refund customers after spring 2020's mass flight cancellations. In response, many carriers swiftly implemented class action waivers to prevent future liability exposure. Before March 2020, only two of the ten largest U.S. carriers' CCs contained class action waivers.⁷ Now, eight do.⁸

The goal of this comment is to evaluate why airlines have rapidly adopted class action waivers over their existing force majeure clauses, highlight class action waivers' chilling effect on passengers' legal remedies for an airline's breach of the CC, and propose that Congress authorize the DOT to implement a European-style system of alternative dispute resolution to facilitate airline-passenger disputes. Part II surveys the current law of Airline Deregulation Act (ADA) pre-emption and federal regulation of the airline industry, concluding that private enforcement through class actions is necessary because the DOT cannot vindicate individual passengers' contractual rights. Part III examines recent trends in airline CC language and compares class action waivers' rapid evolution with force majeure clauses' lack of innovation. It concludes that airlines chose to adopt class action waivers instead of modifying their existing force majeure clauses, because airlines can enforce them more easily in court. Part IV evaluates plaintiffs' ability to challenge class action waivers' enforceability and concludes that traditional equitable challenges like unjust enrichment and unconscionability are not likely to succeed. Parts V and VI explore possible government policy responses to the lack of a class-action mechanism and argue for U.S. policymakers to consider implementing a European-style system of Alternative Dispute Resolution (ADR) as a cost-effective substitute for class actions.

II. CURRENT LAW: THE AIRLINE DEREGULATION ACT AND THE DOT'S AUTHORITY TO REGULATE THE AIRLINE INDUSTRY

Airlines and their passengers contract within two distinct and overlapping regulatory regimes – federal regulations and state common law. The DOT can regulate the content of airline contracts through its statutory authority to investigate and prohibit “unfair or deceptive practice[s]” and “unfair method[s] of competition.”⁹ For example, it has promulgated regulations prohibiting airlines from retroactively changing the CC,¹⁰

Ltd., No. 20-cv-03019-JCS, 3032 U.S. Dist. LEXIS 35061 (Feb. 21, 2021).

⁷ See Exhibit 7 “Spirit Airlines Contract of Carriage (Revised Aug. 25, 2015)” at 38, *Cox v. Spirit Airlines, Inc.*, 340 F.Supp. 3d 154 (E.D.N.Y. 2018) (No. 17-CV-5172); Exhibit A “Frontier Airlines Contract of Carriage (Revised Aug. 22, 2018)” at 24, *Ridgell v. Frontier Airlines, Inc.*, No. 18-CV-4916 (C.D. Cal. Nov. 9, 2018).

⁸ Until 2022, Southwest maintained that its website “terms and conditions” class action waiver extended to its CC. See *infra* note 36 (discussing Southwest's argument in *Bombin*). In 2022, it adopted a class action waiver in the CC. See *infra* note 48.

⁹ 49 U.S.C. § 41712.

¹⁰ 14 C.F.R. § 253.9 (2009).

adopting forum selection clauses,¹¹ or incorporating terms by reference without notice.¹² Additionally, it has adopted interpretative rules characterizing an airline's failure to provide cash refunds for canceled flights as an "unfair or deceptive" trade practice.¹³ The common law of contracts also governs airline CCs. Although the ADA pre-empts state "law[s], regulation[s], or other provision[s] having the force and effect of law" that relate to airline rates, routes, and services,¹⁴ an earlier federal law – the Federal Aviation Act – expressly permits common law causes of action against airlines.¹⁵ This tension has generated significant litigation surrounding which state laws the ADA pre-empts and which laws it does not.¹⁶ The Supreme Court has generally held that the ADA pre-empts state laws that expand the parties' obligations beyond the express terms of the contract or impose "binding standards of conduct."¹⁷ But the ADA does *not* prohibit plaintiffs from enforcing the CCs agreed-upon terms through state contract law.¹⁸ It also does not pre-empt state laws that are "too tenuous, remote, or peripheral[ly] [related to rates, routes, and services] . . . to have pre-emptive effect."¹⁹ However, lower courts are split about when state laws affecting airline activity relate to "rates, routes, or services," and how broadly they should construe these terms.²⁰

The DOT can investigate consumer complaints and push airlines and passengers to resolve disputes themselves.²¹ But its powers are limited to bringing enforcement actions and civil sanctions for violating its regulations.²² It cannot provide individual passengers with redress for airline breaches of the CC. Additionally, the DOT's regulations and interpretative rules create no private right of action.²³ Therefore, passengers

¹¹ 14 C.F.R. § 253.4 (1982).

¹² 14 C.F.R. § 253.10 (2011).

¹³ Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110, 23129 (Apr. 25, 2011) ("Since at least the time of an Industry Letter of July 15, 1996 . . . the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.").

¹⁴ Airline Deregulation Act § 4, 49 U.S.C. § 41713.

¹⁵ See Paul Dempsey, *Federal Preemption of State Regulation of Airline Pricing, Routes, and Services: The Airline Deregulation Act*, 10 FIU L. REV. 435, 438 (2015).

¹⁶ See generally Tory A. Weigand, "No Waif in the Wilderness": *Contractual Doctrine and the "Self" versus "State" Imposed Obligation*, 86 J. AIR L. & COM. 67, 81-91 (2021) (detailing the litigation surrounding the two key provisions).

¹⁷ See *Morales v. TWA*, 504 U.S. 374, 384 (1992); *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 276 (2014).

¹⁸ See *American Airlines v. Wolens*, 513 U.S. 219, 228 (1995).

¹⁹ *Morales supra* note 17 at 390 504 U.S. at 390.

²⁰ See Weigand, *supra* note 16, at 83-86 (2021) (discussing the ongoing circuit split).

²¹ RACHEL TANG, CONG. RSCH. SERV., R43078, AIRLINE PASSENGER RIGHTS: THE FEDERAL ROLE IN AVIATION CONSUMER PROTECTION 8 (2016).

²² See *id.* at 3.

²³ *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007).

seeking to enforce their rights in court can only do so through state law breach-of-contract suits. When an airline breaches the CC, the pecuniary harm to an individual passenger is minor compared to the cost of litigation. CCs typically contain limited-liability provisions that specifically limit consequential and incidental damages,²⁴ and the DOT does not require airlines to reimburse passengers for missed business opportunities or other costs associated with canceled or delayed flights.²⁵ An airline's refusal to issue a cash refund in violation of the "involuntary refund" provision, bumping a passenger from an overbooked flight,²⁶ or not providing a ticketed service²⁷ might cost the passenger, at most, the cost of the ticket plus incidental expenses. These individual injuries are the sort of "small-stakes" claims that are only cost-effective as part of a class action.²⁸ When the harms the plaintiffs have suffered are small relative to litigation costs, class actions allow plaintiffs to pursue a collective remedy where they would not pursue one individually.²⁹ They allow plaintiffs to act as "private attorneys general" and enforce CCs where a widespread breach creates small harms for large numbers of passengers.³⁰ Since the DOT interprets its prohibition on forum-selection clauses in CCs to include arbitration provisions,³¹ class actions may be the only cost-effective way for consumers to seek individual redress against airlines. When the airline's CC contains a class action waiver, a plaintiff will have no cost-effective legal

²⁴ See, e.g., *Conditions of Carriage: Limit of Liability* AM. AIRLINES: LEGAL, PRIVACY, & COPYRIGHT (Revised Apr. 4, 2023), <https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp> ("You agree we are not liable for special, consequential, indirect or incidental damages that arise from this agreement, even if we knew, should've known or were advised damages were possible, including from lost, damaged or delayed bags (including lost revenue or business interruption"); *Rule 24: Governing Law; Entire Agreement; Limitation of Liability*, DELTA AIRLINES: DOMESTIC GENERAL RULES TARIFF 1, 23 (Revised Apr. 13, 2021), <https://www.delta.com/content/dam/delta-www/pdfs/dl-dgr-master-13apr21.pdf> ("Delta shall not be liable for any punitive, consequential or special damages arising out of or in connection with carriage or other services performed by Delta, whether or not Delta had knowledge that such damage might be incurred."); *Rule 28(H): Additional Liability Limitations*, UNITED AIRLINES: CONTRACT OF CARRIAGE DOCUMENT (Revised Nov. 8, 2021), <https://www.united.com/en/us/fly/contract-of-carriage.html> ("UA shall not be liable for any punitive, consequential or special damages arising out of or in connection with carriage or other services performed by UA, whether or not UA had knowledge that such damage might be incurred.").

²⁵ See U.S. DEP'T. TRANSP., AVIATION CONSUMER PROTECTION: FLIGHT DELAYS AND CANCELLATIONS (2018).

²⁶ See, e.g., *Goranson v. Trans World Airlines*, 467 N.Y.S. 2d 774, 777 (White Plains City Ct. 1983).

²⁷ See, e.g., *Knowlton v. Am. Airlines, Inc.*, No. RDB-06-854, 2007 U.S. Dist. LEXIS 6882 at *2 (D. Md. Jan. 31, 2007).

²⁸ See Robert G. Bone, *Class Action 6* (Univ. Tex. Sch. of L., L. & Econ. Research Paper No. 209, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844548.

²⁹ *Id.*

³⁰ *Id.*

³¹ See *Enhancing Airline Passenger Protections*, *supra* note 13 at 23163.

mechanism to privately enforce its terms and must rely on DOT enforcement actions and negotiation to hold the carrier to its contractual obligations. This exculpatory consequence may help explain class action waivers' newfound popularity among airlines.

III. EMPIRICAL FINDINGS: FORCE MAJEURE CLAUSES AND CLASS ACTION WAIVERS IN CCS

This section details my study of trends in CC terms' evolution before and after the beginning of the COVID-19 pandemic. I tracked changes in force majeure clauses (in Table 1) and class action waivers (in Table 2) in the ten largest U.S. airlines' CCs between distinct years. I begin by summarizing my two key results: (1) that airlines have chosen to adopt new class action waivers in lieu of changing their existing force majeure clauses, (2) that newer, "non-legacy"³² carriers such as Spirit and Frontier have more rapidly implemented class action waivers than their older "legacy carrier" counterparts. I then explore possible explanations for these trends, such as the difficulty that airlines have experienced in enforcing force majeure clauses and class action waivers' exculpatory effects.

³² "Legacy Carrier" refers to carriers that operated interstate routes prior to the ADA's passage in 1978, and typically operate with full services and/or larger route networks than other carriers. This paper considers carriers that commenced operations prior to the ADA to be "legacy carriers," and those founded since the ADA to be "non-legacy" carriers. See *Legacy Carriers*, ALTERNATIVE AIRLINES, <https://www.alternativeairlines.com/legacy-carriers>. See also Pablo Coto-Millán et. al., *Assessing Two Airline Models: Legacy vs. Low Cost Carriers*, 42(4) INT'L. J. TRANSP. ECON. 487, 488 (2015).

**Table 1: Default-Form and New-Form Force Majeure Clauses in
Airline Contracts of Carriage**

Carrier	Default Force Majeure (c. 2017)	New Force Majeure (c. 2017)	Default Force Majeure (c. 2021)	New Force Majeure (c. 2021)
American	X		X	
Delta	X		X	
United		X ³³		X
Southwest	X		X	
Alaska	X		X	
Hawaiian	N/A ³⁴			X
All Legacy /6	5/5	1/5	4/6	2/6
JetBlue	X		X	
Frontier	X		X	
Spirit	X		X	
Allegiant	X		X	
All Non-Legacy /4	4/4	0/4	4/4	0/4
Total /10	9/9	0/9	8/10	2/10

³³ Exhibit 2, “United Airlines, Inc. Contract of Carriage (Revised Dec. 1, 2016)” at 35, *Meints v. United Airlines, Inc.* Et. Al. No.1:18-CV-00790 (W.D. Mich. Jul. 17, 2018). BLOOMBERG LAW, <https://www.bloomberglaw.com/product/blaw/document/X1Q6O0LT0RO2?bc=W1siRG9jdW1lbnQiLCIvcHJvZHVjdC9ibGF3L2RvY3VtZW50L1gxUTZPMExUMFJPMj9kb2N1bWVudE5hbWU9MS54bWwiXV0—438f419ba9b24bcdeed2cfc94b036ab9d45dfb60> [hereinafter United CC 2016].

³⁴ This Author could not locate a previous version of the Hawaiian Airlines CC.

Table 2: Default-Form and New-Form Class Action Waivers in Airline Contracts of Carriage

Carrier	Default pre-March 2020	Class Action Waiver pre-March 2020 ³⁵	Default post-March 2020	Class Action Waiver post-March 2020	Default March 2023	Class Action Waiver March 2023
American	X			X		X
Delta	X		X		X	
United	X			X		X
Southwest	X ³⁶		X ³⁷			X ³⁸
Alaska	X			X		X
Hawaiian	N/A		X		X	
All Legacy /6	6/6	0/6	3/6	3/6	2/6	4/6

³⁵ See Sarah Firshein, *The Fine Print on Your Plane Ticket May Have a New Clause*, N.Y. TIMES, Jun. 22, 2020, at B8 (noting that before March 2020, only Spirit and Frontier’s CC’s contained class action waivers).

³⁶ Southwest’s website “Terms and Conditions” have contained a class action waiver since at least 2017. However, its applicability to the CC is disputed. In the recent litigation, Southwest has argued for an expansive interpretation of the class action waiver in its terms of use. See *Bombin*, *supra* note 5 at *7-8. The website’s class action waiver provides that plaintiffs cannot bring any class action “related to [their] access to, dealings with, or use of the Service,” and defines “Service” as “the information, content, features, and services that we own, control, or make available to through the Site.” *Terms and Conditions*, SOUTHWEST (Apr. 4, 2017), <https://www.southwest.com/html/about-southwest/terms-and-conditions/index.html/>. Southwest contended that it “make[s] available” its “services” of air transportation by selling tickets through the website, and therefore the waiver should extend to all air service-related claims. See Southwest Airlines Co.’s Reply Brief in Support of Its Motion to Strike Class Action Allegations or Transfer at 9, No. 20-CV-01883 (E.D. Pa. Mar. 29, 2021). The plaintiffs argued that the class action waiver only barred lawsuits directly stemming from use of the website, such as data privacy suits. See Plaintiff’s Memorandum in Opposition to Southwest Airlines Co.’s Motion to Dismiss, Strike Class Allegations, or Transfer at 16-17, No. 20-CV-01883 (E.D. Pa. Mar. 29, 2021). The court declined to decide the issue, holding that the waiver’s validity was irrelevant since Southwest failed to show that the plaintiff agreed to the terms and conditions when booking. See *Bombin*, *supra* note 5 at *9.

³⁷ See SOUTHWEST AIRLINES CO. CONTRACT OF CARRIAGE – PASSENGER (Revised Nov. 18, 2021), <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf> Southwest was not included in the “New Term” category since its class action waiver was not in the November 2021 version of its CC.

³⁸ *Rule 10(a)(3): Class Action Waiver*, SOUTHWEST AIRLINES CO. CONTRACT OF CARRIAGE – PASSENGER 54 (Revised Dec. 29, 2022), <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf>. Southwest’s December 29, 2022 version of the CC now contains a class action waiver. Luckily for Southwest, it implemented this waiver before its systemwide meltdown between December 21 and December 23, 2022.

Table 2 (continued).

Carrier	Default <i>pre</i> -March 2020	Class Action Waiver <i>pre</i> -March 2020	Default <i>post</i> -March 2020	Class Action Waiver <i>post</i> -March 2020	Default March 2023	Class Action Waiver March 2023
JetBlue	X			X		X
Frontier		X		X		X
Spirit		X		X		X
Allegiant	X			X		X
All Non-Legacy /4	2/4	2/4	0/4	4/4	0/4	4/4
Total /10	8/10	2/10	3/10	7/10	2/10	8/10

Table 1 tracks changes in force majeure clause forms between 2017 and 2021. Each airline CC contains one of two forms of force majeure clause. The default term states that if the provided-for event occurs, then the carrier reserves the right to deny transportation to the passenger and *refund* the price of the passenger’s ticket. This form is dominant among U.S. airlines.³⁹ Most carriers, including American, Delta, Southwest, Alaska, JetBlue, Frontier, and Spirit, use a version of this term in their CCs.⁴⁰ However, United and Hawaiian use an alternate form, which specifically authorizes the carrier to issue future travel credits *in lieu of cash refunds* if a force majeure event occurs.⁴¹ United’s CC has contained this alternate form since at least 2016.⁴² Yet, other carriers have not followed suit and have retained their standard-form force majeure clauses.

In June 2020, the *New York Times*’ Sarah Firshein reported that American Airlines had become the first U.S. “legacy” carrier to implement a class action waiver in its CC.⁴³ Firshein noted that before the March 2020, only two carriers – Spirit and Frontier – had adopted class action waivers in their CCs.⁴⁴ Several other carriers have added them since Firshein’s report.⁴⁵ Table 2 tracks airlines’ adoption of class action waivers before and

³⁹ See *supra*, Table 1.

⁴⁰ *Id.*

⁴¹ See Rule 24(D): *Force Majeure Event*, UNITED AIRLINES: CONTRACT OF CARRIAGE DOCUMENT (Revised Nov. 8, 2021), <https://www.united.com/en/us/fly/contract-of-carriage.html>; See Rule 21(D): *FORCE MAJEURE EVENT*, HAWAIIAN AIRLINES: DOMESTIC CONTRACT OF CARRIAGE (Revised Nov. 22, 2021), <https://www.hawaiianairlines.com/legal/domestic-contract-of-carriage>.

⁴² See United CC 2016, *supra* note 33.”

⁴³ Firshein, *supra* note 35.

⁴⁴ *Id.*

⁴⁵ Rule 3(P): *Application of Contract*, UNITED AIRLINES: CONTRACT OF CARRIAGE

after March 2020, and again after March 2023. As of September 2021, at least seven of the ten largest U.S. airlines employed class action waivers.⁴⁶ As of publication in May 2023, Southwest has added an explicit class action waiver.⁴⁷ Luckily for Southwest, the airline added this waiver before a nationwide system meltdown between December 21, 2022 and December 31, 2022 forced it to cancel thousands of flights.⁴⁸ It has already faced multiple putative class actions stemming from this meltdown.⁴⁹ Airlines' rapid adoption of class action waivers coincided with the COVID-19 pandemic and the refund-seeking class actions. In contrast, COVID-19 did not spur airlines to adopt widespread changes to their existing force majeure provisions.⁵⁰ Why have class action waivers become popular while new force majeure clauses have languished? Two recent lawsuits against U.S. legacy carriers may show why.

A. *Force Majeure Clauses*

Every force majeure clause contains four main elements – it defines the breach that it excuses, defines the scope of the force majeure event, requires a causal connection between the event and the breach, and “explain[s] what will happen if performance is excused.”⁵¹ The second and third elements – scope and causation – are the primary “substantive hurdles” that the breaching party must satisfy.⁵² Proving them in a COVID-related lawsuit is especially difficult, since many force majeure clauses do not explicitly provide for pandemics,⁵³ and even if the clauses *do*

DOCUMENT (Revised Nov. 8, 2021), <https://www.united.com/en/us/fly/contract-of-carriage.html>; *Rule 40: Governing Law, Section Headings, Waiver*, JETBLUE AIRWAYS CONTRACT OF CARRIAGE 59 (Revised Mar. 8, 2023), https://www.jetblue.com/magnolia-public/dam/uiassets/p/contract_of_carriage.pdf; *Rule 3(T): Application of Contract*, ALASKA AIRLINES, INC. CONTRACT OF CARRIAGE (Revised Jan. 19, 2023), <https://www.alaskaair.com/content/legal/contract-of-carriage/english-COC>.

⁴⁶ Eight, counting Southwest. See notes 39-40 (discussing the uncertainty of Southwest's pre-2022 class action waiver).

⁴⁷ See Rule 10(a)(3): Class Action Waiver, *supra* note 38.

⁴⁸ Chris O'Malley, *Litigation-Minded Southwest Airlines Passengers to Confront 'Class Action Waiver'*, LAW360 CORPORATE COUNSEL (Jan. 6, 2023, 11:26 AM), <https://www.law.com/corpocounsel/2023/01/06/litigation-minded-southwest-airlines-passengers-to-confront-class-action-waiver/>.

⁴⁹ *Id.*

⁵⁰ See *supra* Table 1.

⁵¹ See Paula M. Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, AM. BAR ASS'N: CONT. BOILERPLATE FOR LITIGATORS (Mar 25, 2021), <https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/>.

⁵² See Robyn S. Lessans, *Force Majeure and the Coronavirus: Exposing the "Foreseeable" Clash between Force Majeure's Common Law and Contractual Significance*, 80 MD. L. REV. 799, 804-07 (2021). See also Robinson et al., *Use the Force? Understanding Force Majeure Clauses*, 44 AM. J. TR. AD. 1, 18-20 (2020).

⁵³ American and JetBlue's force majeure clauses explicitly provide for “pandemics” or

encompass disease, the party seeking to invoke the clause must still prove that the virus was the actual and proximate cause of its nonperformance.⁵⁴ If an airline cannot prove these elements and convince a court to enforce the provision, its ability to issue travel credits in lieu of refunds is irrelevant. For example, in, *Rudolph v. United Airlines*, the Northern District of Illinois limited United's "force majeure" clause.

In *Rudolph*, plaintiffs Mark Hansen and Jason Buffer sued United on behalf of a putative class after the airline canceled (and failed to refund) their respective flights from Vancouver to Liberia, Costa Rica via Houston and from New York to Athens via Frankfurt.⁵⁵ In their complaint, the plaintiffs alleged that United canceled their flights "because of a desire to save on operating expenses" during the air travel downturn.⁵⁶ United moved to dismiss, citing its force majeure provision (and, in the alternative, impracticability). It claimed that the Department of Health and Human Services' (HHS) declaration of a "public health emergency," the Federal Government's "do not travel" warnings and the State Department's "Global Level 4 Health Advisory," and the Costa Rican government's ban on foreign visitors into the country were "Force Majeure Events" that prevented it from performing.⁵⁷ United argued that these events all fell within its force majeure clause's "catch all" provision, which encompasses "[a]ny event not reasonably foreseen, anticipated, or predicted by [United]" and "beyond [its] control."⁵⁸ It also contended that the border closures fell within a specific subcategory that characterized "[a]ny governmental regulation, demand, or requirement" as a force majeure event.⁵⁹

The court agreed that the Costa Rican government's border closures were "force majeure" events under the "government regulation" provision but rejected United's argument that the other events fell within the "catch

"public health emergencies". *Conditions of Carriage: Events Beyond Our Control (Force Majeure)*, AM. AIRLINES: LEGAL, PRIVACY, & COPYRIGHT (Revised Apr. 4, 2023), <https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp>; *Rule 25(c): Failure to Operate as Scheduled*, JETBLUE AIRWAYS CONTRACT OF CARRIAGE 37 (Revised Mar. 8, 2023), https://www.jetblue.com/magnoliapublic/dam/uiassets/p/contract_of_carriage.pdf.

⁵⁴ See Timothy Murray, *Force Majeure and the Coronavirus: Seven Critical Lessons from the Case Law*, LEXISNEXIS: PRAC. GUIDANCE J. (Jun. 16, 2020), <https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/force-majeure-and-coronavirus-covid-19-seven-critical-lessons-from-the-case-law>.

⁵⁵ *Rudolph*, *supra* note 5 at 449.

⁵⁶ *Id.*

⁵⁷ *Id.* at 448.

⁵⁸ See *id.* at 442-43 (quoting Rule 3(P): Application of Contract, *supra* note 45).

⁵⁹ See *id.* at 449. This resembles the type of event that contracts often define as "force majeure." For a non-exhaustive list, see Janice M. Ryan, *Understanding Force Majeure Clauses*, VENABLE LLP: INSIGHTS (Feb. 2011), <https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses>.

all” provision.⁶⁰ It employed the canon against superfluity, finding that “there must be some point at which a Force Majeure Event ends.”⁶¹ Therefore, the catch-all provision was ambiguous. Construing this ambiguity against United, the drafting party, the court determined that these events did not satisfy the catch-all’s definition of “force majeure.”⁶² In dicta, it noted that “even assuming” that the HHS declaration and State Department travel advisories *were* force majeure events, United still could not show that these events caused it to fail to perform.⁶³ However, the court found that Costa Rica’s border closures satisfied causation because “no reasonable air carrier would agree to transport an American citizen . . . [to Costa Rica] under those circumstances, where he would not be permitted entry on arrival.”⁶⁴ Therefore, United *could* invoke its force majeure clause and issue travel credits for Hansen’s flights between Houston and Costa Rica, and Hansen “fail[ed] to state a plausible breach of contract claim as to those flights.”⁶⁵

Rudolph exemplifies the inherent problem of force majeure provisions. While force majeure can excuse performance when definitive one-off events, such as a barn burning down or government travel bans, prevent performance, the doctrine may not excuse performance where general economic hardships and financial difficulties render performance difficult. Broad catch-all clauses are largely ineffective since courts tend to construe them narrowly and against the drafter.⁶⁶ Carriers have struggled to convince courts that COVID-19 and its related economic impacts are “force majeure events” if the CC does not specifically provide for pandemics.⁶⁷ Even if an airline successfully convinced a court that COVID-19 is a force majeure event, it would still struggle to show that the pandemic itself *caused* its inability to perform. An event that renders performance cost-ineffective or unduly burdensome usually will not satisfy causation.⁶⁸ The virus and

⁶⁰ *Rudolph*, *supra* note 5 at 449.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 450.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See 11 WILLISTON ON CONTRACTS § 32:12 (4th ed. 2021); see, e.g., *Rudolph*, *supra* note 5 at 449.

⁶⁷ This author could only find two occasions where a COVID-induced “force majeure” defense was successful. In both cases, government border closures, and not the pandemic itself, constituted the “force majeure” event. See *Daversa-Evdyriadis v. Norwegian Air*, No. EDCV 20-767-JGB(SPx). 2020 U.S. Dist. LEXIS 173854, at *14 (Sep. 17, 2020). See also *supra* note 55-65 (discussing *Rudolph*).

⁶⁸ See *Lessans*, *supra* note 52, at 807. See also *Murray*, *supra* note 54. But see *Banco Santander, S.A. v. Am. Airlines, Inc.*, No. 20-CV-3098RPKRER, 2021 WL 2820646, at *3 (E.D.N.Y. Oct. 15 2021) (suggesting a more lenient “frustration of purpose” standard that would not require a *complete* inability to perform).

public health measures may have quashed demand for travel,⁶⁹ but they did not physically prevent airlines from operating flights. Though Costa Rica and many others closed their borders, the United States, Canada, and Mexico, did not fully close them.⁷⁰ A flight cancellation and refusal to refund when borders are open, but travel demand is heavily reduced would still stem from the airline's decision to cancel the flight. Therefore, a force majeure clause would not cover it. This difficulty may explain why the boilerplate form of force majeure remains widespread. Carriers likely know these provisions will not cover everything, so they do not attempt to change them and instead seek out alternative methods of limiting liability, such as class action waivers.

B. Class Action Waivers

Unlike force majeure clauses, class action waivers do not require the party seeking enforcement to prove a set of elements. Like the forum-selection provision at issue in *Carnival Cruise v. Shute*, a class action waiver is enforceable by its mere existence in the contract.⁷¹ Like all standard-form contract terms, the non-drafting party has a duty to read and understand a class action waiver, and the party seeking to void the term bears the burden of proving unfairness or lack of assent.⁷² It eliminates the extra steps that the drafting party must take to invoke a force majeure clause, as long as the drafting party can show that the non-drafting party agreed to it.⁷³ Courts upheld airline class action waivers before the pandemic and have largely continued to do so. Spirit's class action waiver has survived challenges before⁷⁴ and during⁷⁵ the pandemic. Though Frontier's class action waiver has not been as heavily litigated, courts have given little indication that they would strike it down if addressed.⁷⁶ Although most of the recent class action cases have arisen under airline CCs without class action waivers, airlines have succeeded as third-party beneficiaries of booking agencies' class action waivers.⁷⁷ For example, in

⁶⁹ *Air travel down 60 per cent, as airline industry losses top \$370 billion: ICAO*, UNITED NATIONS: UN NEWS (Jan. 15, 2021).

⁷⁰ See *Coronavirus: Travel restrictions, border shutdowns by country*, AL JAZEERA: NEWS; TOURISM (Jun. 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country>.

⁷¹ See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593 (1991).

⁷² *Cf. id.* at 595.

⁷³ See *Bombin*, *supra* note 5 at *8-9.

⁷⁴ See *Roman v. Spirit Airlines*, 482 F. Supp 3d 1304, 1315 (S.D. Fla. 2020).

⁷⁵ See *Hill*, *supra* note 5 at *1 (the parties stipulated to dismissal after *Roman* was decided).

⁷⁶ See *In re Frontier Airlines Litig.*, *supra* note 5 at *32, fn. 10 (noting that since the plaintiffs did not state a viable claim, the court did not need to apply Frontier's class action waiver).

⁷⁷ Since these cases all concern travel booked before airlines implemented class action waivers, these disputes arise under older versions of the CCs that do not have class action

Ward v. American Airlines, a group of three named plaintiffs sued American on behalf of a putative class.⁷⁸ Two plaintiffs, Holloway and Saunders, booked through Hotwire and Expedia, sites whose terms and conditions contained class action waivers and mandatory arbitration provisions.⁷⁹ The third named plaintiff, Ward, booked through OneTravel.com, which had neither.⁸⁰ The court dismissed Holloway and Saunders' claims, holding that American could invoke the arbitration provision and class action waiver as a third-party beneficiary.⁸¹ It allowed Ward's claim to move forward.⁸² Where courts have declined to enforce third-party class action waivers for airlines' benefit, they have only invalidated the arbitration provisions, not the class action waivers.⁸³ Since airlines face fewer hurdles to employing class action waiver than force majeure clauses, it is logical that these provisions have become the focal point for contract innovation. Though class action waivers offer airlines a valuable exculpatory tool, they give passengers a raw deal by requiring them to sue in an individual capacity, rendering small-dollar claims cost-ineffective.⁸⁴ Although the ADA pre-empts many state-law challenges to language in airline contracts, there are still several ways for plaintiffs to challenge class action waivers as unenforceable.

IV. POSSIBLE LEGAL CHALLENGES TO CLASS ACTION WAIVERS

Class action waivers appear to be quite exculpatory for airlines. But can passengers challenge them in court? The equitable doctrine of unconscionability offers one possible avenue. The ADA pre-empts most state law equity claims like unjust enrichment or breach of the covenant of good faith and fair dealing.⁸⁵ These claims seek to impose "binding standards of conduct that operate irrespective of any private agreement."⁸⁶ They are essentially state enforcement of substantive standards of conduct. However, some causes of action, such as unconscionability, may not be pre-empted. The Supreme Court has *not* explicitly held that the ADA pre-empts unconscionability, and no federal court has decided an unconscionability challenge to an airline's class action waiver.⁸⁷ Unconscionability is a

waivers.

⁷⁸ See *Ward*, *supra* note 5 at 913.

⁷⁹ *Id.* at 914.

⁸⁰ *Id.*

⁸¹ *Id.* at 920.

⁸² *Id.* at 928.

⁸³ *Rudolph*, *supra* note 5 at 447 ("United should not be permitted to do indirectly what federal regulations prohibit it from doing directly").

⁸⁴ See generally *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁸⁵ See *Ginsberg*, *supra* note 17 at 276.

⁸⁶ *Id.*

⁸⁷ See, e.g., *Roman*, *supra* note 74 at 1313-14 (enforcing a class action waiver in Spirit's CC). Importantly, the *Roman* plaintiffs did not challenge the class action waiver's validity.

muddled doctrine, with few clear rules. States are divided as to when and how they apply it.⁸⁸ In many states, procedural or substantive unconscionability alone is not enough to render a contract provision unenforceable.⁸⁹ In a minority of states, including Vermont, Illinois, Missouri, and New Mexico, unconscionability challenges are more promising because plaintiffs must only establish one form of unconscionability.⁹⁰ But an unconscionability challenge to a class action waiver still may not survive pre-emption. Its viability turns on specific state law and how the court views the ADA's "rates, routes, and services" language. Even if an unconscionability challenge survives pre-emption, its viability depends on several factors, including (1) the absence of a choice-of-law provision in the CC and (2) the forum state's underlying contract law. This next section discusses the latter's interaction with ADA pre-emption.

A. Procedural Unconscionability: Survives Pre-Emption, but Fails on the Merits

1. ADA Pre-Emption

The ADA likely does not pre-empt procedural unconscionability. The Fifth, Seventh, and Tenth circuits have suggested that the ADA does not preclude application of state-law interpretative principles when courts are interpreting an agreement to determine whether mutual assent exists.⁹¹ Since procedural unconscionability is concerned with assent, it does not "enforce or enact" a state policy decision that the ADA would pre-empt. Nor does it "impermissibly seek to enlarge" the parties' obligations under the agreement.⁹² As aviation attorney Tory Wiegand observes in the *SMU Air Law Journal*, Justice O'Connor's concurrence in *American Airlines v. Wolens* appears to support this interpretation. In *Wolens*, the Court reaffirmed its earlier holding in *Morales v. Trans World Airlines, Inc.* that

They argued that it should not apply at all, as the term they alleged Spirit breached (a "shortcut security" ticket add-on) was not incorporated by reference into the CC. *See also Bombin, supra* note 5 at *8-9 (punting on the class action waiver issue).

⁸⁸ See Susan Naldrum, *Much Ado About Nothing? What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 767 (2014).

⁸⁹ *Id.*

⁹⁰ *Id.* at fn. 56 (citing *Glassford v. BrickKicker*, 35 A.3d 1044, 1047 (Vt. 2011); *Kinkel v. Cingular Wireless*, 857 N.E.2d 250, 263 (Ill. 2006), *Cordova v. World Fin. Corp. of N.M.*, 208 P.2d 901, 908 (N.M. 2009)). *See also* *Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 23 (Mo. 2010).

⁹¹ *See* *Scarlett v. Air Methods Corp.*, 922 F.3d 1054, 1068 (10th Cir. 2019) (citing *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 289-90 (5th Cir. 2002); *United Airlines, Inc., v. Mesa Airlines, Inc.* 219 F.3d 605, 609 (7th Cir. 2000)).

⁹² *Ginsberg, supra* note 17 at 276.

the ADA pre-empts state regulation of air carriers.⁹³ But it also crafted an exception to this general rule: the ADA does not pre-empt state courts from adjudicating breach-of-contract claims involving air carriers.⁹⁴

In her concurrence, Justice O'Connor argues that "a determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract." Unconscionability is not a "purely policy-oriented doctrine that courts impose over the will of the parties," but instead it "demonstrates that state public policy cannot be easily separated from the methods by which courts are to decide what the parties 'intended.'"⁹⁵ O'Connor suggests that there is no clean distinction between imposing state policy judgments and regular contractual interpretation, and unconscionability does not neatly fit into one of the two categories. Wiegand notes that most courts have rejected unconscionability claims.⁹⁶ But each case he cites rejects unconscionability arguments on their *merits*, and not on pre-emption grounds.⁹⁷ Only one federal court has explicitly held that the ADA pre-empts an unconscionability challenge to *any* CC provision.⁹⁸ The Fifth Circuit has applied analogous reasoning to O'Connor's in holding that the ADA does not pre-empt fraudulent inducement claims.⁹⁹ Plaintiffs in recent litigation have already used this view of procedural unconscionability to push their challenges past pre-emption.¹⁰⁰

2. Application to Class Action Waivers

Even though the ADA may not pre-empt it, procedural unconscionability is not viable on its merits. In *Carnival Cruise Lines v. Shute*, the Supreme Court held that adhesiveness alone is not enough for a provision to be procedurally unconscionable.¹⁰¹ Few, if any, consumers read the fine print in standard-form contracts.¹⁰² However, courts presume that they do, and impose a "duty to read" on the non-drafting party.¹⁰³ To

⁹³ See *Wolens*, *supra* note 18 at 226.

⁹⁴ *Id.* at 232.

⁹⁵ Wiegand, *supra* note 16, at 135 (quoting *Wolens*, 523 U.S. at 239, O'Connor, J. concurring).

⁹⁶ See *id.*

⁹⁷ See *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 169 (2d Cir. 1997); *Martin v. United Airlines*, 727 Fed. Appx. 459, 463 (10th Cir. 2018); *Shipwash v. United Airlines, Inc.*, 28 F.Supp 3d 740, 755-56 (E.D. Tenn. 2014).

⁹⁸ See *Levey v. Concesionaria Vuela Compania de Aviacion, S.A.P.I. de C.V.*, No.20-cv-2215. 2021 U.S. DIST LEXIS 58749 at *10. (N.D. Ill. March 29, 2021).

⁹⁹ See *Lyn-Lea Travel Corp.*, *supra* note 91 at 289-90.

¹⁰⁰ See Plaintiffs' Opposition to Defendant's Motion to Dismiss at 2, *In re Frontier Airlines Litig.*, No. 20-cv-1153-PAB-KLM.

¹⁰¹ See *Shute*, *supra* note 71 at 593.

¹⁰² See Bakos et. al. *Does Anyone Actually Read the Fine Print?: Consumer Attention to Standard-Form Contracts*, 43 J. LEG. STUD. 1, 19-20 (2014).

¹⁰³ See, e.g., *Deiro v. American Airlines*, 816 F.2d 1360, 1365 (9th Cir. 1987).

argue procedural unconscionability, a plaintiff must show “some impropriety during the process of forming the contract” that “depriv[ed] the party of meaningful choice.”¹⁰⁴ For example, Illinois courts have considered whether the non-drafting party had “the opportunity to understand the terms of the contract,” or whether the terms were “hidden in a maze of fine print.”¹⁰⁵ Courts have also found procedural unconscionability where the drafting party has made the questionable term “difficult or onerous to find or obtain” at the time of assent.¹⁰⁶ Other jurisdictions have reached similar conclusions.¹⁰⁷

This determination requires case-by-case application, but some airlines’ class action waivers are vulnerable to challenge. For example, before Southwest added an explicit class action waiver to its CC, it argued that the class action waiver in its *website* terms and conditions covered the CC.¹⁰⁸ The 2021 version of the CC does not reference this document.¹⁰⁹ Even though the class action waiver and forum selection provision are bolded in the website’s terms and conditions,¹¹⁰ the document does not indicate that these terms apply to ticket purchases. The class action waiver states that it only applies to “services,” which lies alongside terms such as “information” and “content.”¹¹¹ Unless a consumer is well-versed in contract interpretation, it would be reasonable to assume that the waiver only applies to lawsuits pertaining to the website. Southwest’s CC contained a choice-of-law provision specifying that Texas law applied to the contract.¹¹² Assuming the provision was enforceable, Southwest’s old class action waiver may have been procedurally unconscionable under Texas law. Although Texas’s procedural unconscionability case law is sparse, its courts generally require plaintiffs to show that the unclear term “took advantage of [the plaintiff]’s lack of knowledge and that the resulting

¹⁰⁴ *Phoenix Ins. Co. v. Rosen*, 949 N.E.2d 639, 647 (Ill. 2010). *See generally* *Razor v. Hyundai Motor Am.*, 854 N.E.2d 567 (Ill. 2006); *Frank’s Maintenance & Engineering Co. Inc., v. C.A. Roberts Co.*, 408 N.E.2d 403 (Ill. Ct. App. 1st Dist. 1980).

¹⁰⁵ *See Phoenix Ins.*, *supra* note 104 at 647.

¹⁰⁶ *Zuniga v. Major League Baseball*, No. 1-20-1264 (Ill. Ct. App. 1st Dist. 2021) (finding a mandatory arbitration provision on the back of a baseball ticket to be procedurally unconscionable, where only a summary of the provision was present, and in very small print).

¹⁰⁷ *See, e.g., Manfredi v. Blue Cross & Blue Shield of Kan. City*, 340 S.W.3d 126 (Mo. W.D. Ct. App. 2011).

¹⁰⁸ *See Terms and Conditions*, SOUTHWEST (Apr. 4, 2017), <https://www.southwest.com/html/about-southwest/terms-and-conditions/index.html/> [hereinafter *Southwest Terms and Conditions*]. *See also Bombin*, *supra*, note 5.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Rule 10(c): Choice of Law, Entire Agreement*, SOUTHWEST AIRLINES CO. CONTRACT OF CARRIAGE – PASSENGER 54 (Revised Dec. 29, 2022), <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf>.

unfairness was glaringly noticeable, flagrant, complete, and unmitigated.”¹¹³ However, if a court agreed that Southwest’s purported applied to the ticket itself, it could conceivably have invalidated it under this heightened standard. The waiver appeared in a separate section of the website and did not indicate that it applied to the tickets purchased through the website in addition to use of the website itself.¹¹⁴ This placement may well have been deceptive enough for a court to find the waiver unconscionable. Therefore, Southwest’s former class waiver likely remained vulnerable to challenge.

This vulnerability may explain why Southwest updated its CC in 2022 to include an explicit class action waiver, in line with other carriers.¹¹⁵ In contrast, American, Alaska, Spirit, and JetBlue’s waivers would prove more likely to survive a challenge. Each of these provisions is set forth in the CC, in a section entitled “No Class Action” or “Class Action Waiver.” Each specifically provides that suits brought under any provision of the CC are subject to the waiver.¹¹⁶ United’s is less clear but is still likely enforceable. It is buried in section “P” of a broad rule titled “Application of the Contract.”¹¹⁷ But any potential plaintiff who reads the contract is likely to recognize the class action waiver. It specifically states that a passenger agrees to it “by purchasing a ticket or accepting transportation under *this* contract of carriage.”¹¹⁸ A procedural unconscionability challenge is unlikely to succeed in these cases, because each provision explicitly states that the passenger agrees only to sue in their individual capacity, and not as part of a class action proceeding.

B. Substantive Unconscionability: Unlikely to Survive Pre-Emption, but May Win on the Merits

1. ADA Pre-Emption

The ADA likely pre-empts substantive unconscionability. A judicial determination of substantive unconscionability is a state policy judgment, so it is likely an “enforcement” within the ADA’s definition.¹¹⁹ However, a

¹¹³ Gallardo v. TCI Cablevision of Texas, Inc., No. 13-02-460-CV, 2004 WL 193262, at *3 (Ct. App. Tx. Aug. 31, 2004).

¹¹⁴ See Southwest Terms and Conditions, *supra* note 108.

¹¹⁵ See Rule 10(a)(3): Class Action Waiver, *supra* note 38.

¹¹⁶ See *Conditions of Carriage: Contract Details*, AM. AIRLINES: LEGAL, PRIVACY, & COPYRIGHT (Revised Apr. 4, 2023), <https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp>; *Rule 3(T): Application of Contract*, *supra* note 45; *Choice of Law and Venue: No Class Action*, SPIRIT CONTRACT OF CARRIAGE (Revised Mar. 1 2023), https://content.spirit.com/Shared/en-us/Documents/Contract_of_Carriage.pdf; Rule 40: Governing Law, Section Headings, Waiver, *supra* note 45.

¹¹⁷ See Rule 3(P): Application of Contract, *supra* note 45).

¹¹⁸ *Id.* (Emphasis added).

¹¹⁹ See 49 U.S.C. 41713.

colorable argument exists that the ADA should not pre-empt substantive unconscionability, *as applied to class action waivers*. Enforcement actions must still have a “connection with or reference to” “rates, routes, or services” to come within the scope of ADA pre-emption.¹²⁰ Class action waivers – which pertain to liability and judicial redress – may not concern routes, rates, *or* services. “Services” and “rates” are the likely areas of dispute. Circuit courts are split as to how far to extend the scope of “services.”¹²¹ Most circuits have adopted a broad view of “services” as anything contained within the CC.¹²² Since class action waivers are contained within the CC, they are part of the contract for “services” that the parties bargained for, even if the parties did not bargain over that specific term.¹²³ Therefore, if a court adopted the majority view, a substantive unconscionability challenge to a class action waiver would be pre-empted. The Ninth and Eleventh circuits have adopted a narrower approach, holding that “services” only pertains to the specific services over which airlines compete.¹²⁴ Everyday passengers do not “bargain” with airlines over class-action waivers.¹²⁵ Though institutional clients with large corporate accounts or charter reservations might bargain over these terms, for most consumers, they are not within the range of “bargained for” services. Therefore, under this narrower reading, an unconscionability challenge may survive.

Even if a court accepted the narrower interpretation of “services,” a successful unconscionability claim must still show that class action waivers are unrelated to “rates.” Class action waivers may relate to “rates” through litigation costs. Since class action waivers help airlines avoid potentially large judgments or settlements, they reduce corporate legal expenses, and airlines could pass those savings on to the consumer in the form of cheaper tickets.¹²⁶ Courts addressing the issue have held that the ADA pre-empts

¹²⁰ See *Ginsberg*, *supra* note 17 at 276.

¹²¹ See *Wiegand*, *supra* note 16, at 83 (discussing the circuit split).

¹²² See *id.* (“Other Circuits, including the First, Second, Fourth, Fifth, and Seventh, have taken a broader view . . .”). See also *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423 at 1433, quoting *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (“[s]ervices’ generally represent a bargained-for or anticipated provision of labor from one party to another . . . [This] leads to a concern with the contractual agreement between the airline and the user of the service.”).

¹²³ See generally *Hodges*, *supra* note 122 at 334.

¹²⁴ See *Amerijet Int’l v. Miami Dade County*, 627 Fed. Appx. 744, 748–49, *cert. denied*, 578 U.S. 976 (2016) (“three elements must be present for a particular service to be deemed a ‘service’ for purposes of the ADA: (1) it must fit within the limited range of services over which airlines compete, (2) it must be bargained for, and (3) the bargained-for exchange must be between an air carrier and its consumers”). See also *Wiegand*, *supra* note 16, at 85 (discussing *Mennella v. Am. Airlines*, 824 F. Appx. 696, 703 (11th Cir. 2020) (“[the issue is] not . . . the type of state law claim, but what the state law claim targeted.”)).

¹²⁵ See *Bakos et. al.*, *supra* note 102 (discussing class action waivers’ adhesive character).

¹²⁶ See generally *Litigation Cost Survey of Major Companies*, DUKE LAW SCHOOL: CONFERENCE ON CIVIL LITIGATION (2010).

state laws that relate to operating expenses, and thus to price, like seat legroom¹²⁷ and skycap tips.¹²⁸ Class action waivers are distinguishable from each of these cases. While these all involve a *direct* relationship to rates and prices (fewer seats means higher prices per seat, and regulation of skycap tips leads to a new curbside check-in fee), litigation costs are only tangentially related to prices. Taken to its logical extreme, arguing that state laws which may increase litigation costs or result in large judgments that affect prices would mean that a state law is pre-empted *any* time it could affect an airline's bottom line. But this would pre-empt breach of contract judgments, jet fuel taxes,¹²⁹ and other state legal actions. Therefore, litigation costs likely do not relate to "rates." Even though a substantive unconscionability claim *might* survive pre-emption if a court adopts the minority position in this circuit split, it still imposes state policy on a carrier, so a court may still be unwilling to allow it.

2. Application to Class Action Waivers

If the ADA does not pre-empt a procedural unconscionability claim, consumers in some states may have colorable arguments that airline class action waivers are unconscionably exculpatory. In the notable *Discover Bank* case, the California Supreme Court held class action waivers unconscionable "to the extent they operate to insulate a party from liability that otherwise would be imposed under [state] law."¹³⁰ The court further noted that, though these provisions are not exculpatory "in the abstract," they function as such because of the relatively small dollar amounts at stake in consumer cases, which leave class action suits as the only effective means of redress for aggrieved consumers.¹³¹ This is true in the airline industry.¹³² Like other small-value claims, airline ticket refunds become cost-prohibitive if pursued individually. A class action waiver functionally exculpates airlines from liability for most breaches of the CC, like denying airfare refunds, failing to deliver promised add-on services,¹³³ and other small-value offenses. The Supreme Court has held that the Federal Arbitration Act pre-empts substantive unconscionability challenges to class action waivers when they are attached to mandatory arbitration clauses.¹³⁴ But federal courts have permitted unconscionability challenges to

¹²⁷ See *Witty v. Delta Air Lines, Inc.* 366 F.3d 380, 383 (5th Cir. 2004). *But see* *Montalvo v. Spirit Airlines*, 508 F.3d 464, 476 (9th Cir. 2007).

¹²⁸ See *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 89 (1st Cir. 2011).

¹²⁹ See, e.g., Ill. Rev. Code §35 ILCS 505.4d (2000).

¹³⁰ *Discover Bank*, *supra* note 84 at 1100.

¹³¹ *Id.*

¹³² See *Dempsey*, *supra* note 15 (discussing passengers' limited causes of action in lawsuits against airlines).

¹³³ See *Roman*, *supra* note 74 at 1304.

¹³⁴ See *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

freestanding class action waivers.¹³⁵ And no U.S. airline's CC contains a mandatory arbitration provision, since courts and the DOT have interpreted 14 CFR 253.10's ban on forum selection provisions to extend to arbitration clauses.¹³⁶ *Discover Bank* rules still exist in several states,¹³⁷ and are a viable way to challenge class action waivers in the states that have them.

V. EXPLORING POSSIBLE POLICY RESPONSES TO CLASS ACTION WAIVERS

If class action waivers are likely to survive legal challenges, but foreclose passengers from obtaining redress, how can regulatory authorities like Congress and the DOT balance airline and passenger interests? If the federal government allows class action waivers to remain in place, then they will functionally exculpate airlines from breaches of the contract of carriage,¹³⁸ and the only regulatory "check" on airline conduct will be DOT sanctions.¹³⁹ A ban on class action waivers to restore class action suits, creating passenger-rights legislation to enable individual causes of action, and adopting other countries' systems of private dispute resolution are three possible policy responses to the proliferation of class action waivers.

A. DOT Ban on Class Action Waivers

The ADA vests the DOT with authority to regulate "unfair and deceptive practices" among airlines.¹⁴⁰ The DOT could promulgate a rule categorizing class action waivers in CCs as an "unfair and deceptive" trade practice and prohibit airlines from creating them. But this might not stop airlines from engaging in the practice. For example, innovative carriers could adopt Southwest's approach, placing class action waivers in other documents and incorporating them by reference.¹⁴¹ Additionally, notice-and-comment rules are far easier to undo than statutes.¹⁴² A statutory solution could prevent future administrations from changing the policy.

¹³⁵ See, e.g., *Meyers v. Kalanick*, 477 F.Supp 3d 52 (S.D.N.Y. 2020).

¹³⁶ See, *Enhancing Consumer Passenger Protections*, *supra* note 13 at 23110. See also *Rudolph*, *supra* note 5 at 447.

¹³⁷ See, e.g., *Discover Bank*, *supra* note 84; *Kinkel*, *supra* note 90; *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006); *Brewer*, *supra* note 90. See also J. Maria Glover *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements* 59 VAND. L. REV. 1735, 1752-53, fn. 87 (2006) (finding similar rules in West Virginia and Florida).

¹³⁸ See *Bone*, *supra* note 28, at 6 (discussing class action waivers' exculpatory character).

¹³⁹ See TANG, *supra* notes 21-22 (discussing the DOT's statutory authority to regulate the airline industry).

¹⁴⁰ See *id.*

¹⁴¹ See *Bombin*, *supra* note 5 at *7-8 (discussing Southwest's purported class action waiver).

¹⁴² See Regul. Stud. Ctr., *Regulatory Reset: How Easy is it to Undo Regulation?*, GEO. WASH. U. (Dec. 1, 2016), <https://regulatorystudies.columbian.gwu.edu/regulatory-reset-how-easy-it-undo-regulation>.

B. *Passenger Bill of Rights*

Since 1989, members of Congress have tried to create new passenger protections through various attempts at “Passenger Bill of Rights” (“PBOR”) legislation. PBOR legislation seeks to grant U.S. passengers a broad set of statutory rights like those that European passengers enjoy, and recent versions have included class action waiver bans and private rights of action for consumers to enforce DOT regulations and statutory rights.¹⁴³ To date, no PBOR bill has come to either Chamber’s floor for a vote,¹⁴⁴ but the DOT has occasionally adopted some of their ideas into its passenger protection regulations.¹⁴⁵ Why have so many bipartisan efforts to pass the PBOR stalled? One possibility is that the airline industry has successfully lobbied to keep these bills from advancing. Since 1998, airlines have spent a collective \$1.7 billion on lobbying, the fourteenth-highest total of any industry.¹⁴⁶ In their efforts to defeat the 1999 PBOR legislation, the airlines collectively spent over \$3 million on lobbying, and sent representatives to argue that the bill “represented a re-regulation of commercial air transportation.”¹⁴⁷

But other factors suggest that Congress may be more responsive to airline passengers’ interests than those of other consumer groups. University of Central Florida professor and aviation litigator Timothy Ravitch speculates that members of Congress have continually taken an interest in enhanced passenger protections because their jobs involve frequent interaction with the air transportation system.¹⁴⁸ He points out that “narratives of terrible airline service resonate with representatives who must travel from Washington, D.C. to their districts.”¹⁴⁹ Since many members of Congress appear to have a personal stake in airline passenger

¹⁴³ See Airline Passengers’ Bill of Rights, S. 1418 115th Cong. (2017).

¹⁴⁴ See, e.g., Airline Passenger Bill of Rights H.R. 3528 101st Cong. (1989); Airline Passenger Bill of Rights Act of 1999 H.R. 700 106th Cong. (1999); Airline Passenger Bill of Rights Act H.R. 1734 107th Cong. (2001); Airline Passenger Bill of Rights Act of 2007 S. 678 110th Cong. (2007); Airline Passenger Bill of Rights Act of 2007 H.R. 1303 110th Cong. (2007); Airline Passenger Bill of Rights Act of 2009 S. 213 111th Cong. (2009); Airline Passenger Bill of Rights Act of 2009 H.R. 624 111th Cong. (2009); Airline Passenger Bill of Rights Act of 2011 H.R. 729 112th Cong. (2011); Airline Passengers’ Bill of Rights S. 1418 115th Cong. (2017); Airline Passengers’ Bill of Rights S. 2341 116th Cong. (2019).

¹⁴⁵ See Matthew Schoonover, *Oversold, Delayed, Rescheduled: Airline Passenger Rights and Protections*, 35 WASH. U. J. L. POL’Y. 519, 521 (2011); see also TANG, *supra* note 21; Compare Airline Passenger Bill of Rights Act of 2007 H.R. 1303 110th Cong. (2007) with Enhancing Airline Passenger Protections, *supra* note 13 at 23112.

¹⁴⁶ See *Influence & Lobbying: Industries*, OPENSECRETS (Oct. 22, 2021), <https://www.opensecrets.org/federal-lobbying/industries?cycle=a>.

¹⁴⁷ Timothy M. Ravich, *Re-Regulation and Airline Passengers’ Rights*, 67 J. AIR L. & COM. 935, 953 (2002).

¹⁴⁸ See *id.* at 940.

¹⁴⁹ *Id.*

protection, lobbying is an incomplete explanation. These bills are also victims of bad timing and the grind of the legislative process. The 2001 bill came just before the September 11 attacks, which shifted Congress's focus to foreign policy and national security concerns.¹⁵⁰ The next major bills came between 2007 and 2010,¹⁵¹ during the peak of the Great Recession, and the most recent just before the COVID-19 pandemic.¹⁵² Few bills ever make it out of committee, and only two to six percent of the legislation introduced in any Congress will become law.¹⁵³ At any rate, standalone PBOR legislation appears unlikely to pass Congress.

C. *Alternative Enforcement Regimes*

Instead of passing sweeping PBOR legislation, Congress could draw inspiration from other countries' mechanisms for processing passenger complaints. A solution that adapted aspects from these systems could preserve the predictability and reduced liability risk that make class action waivers appealing, while lessening the costs for passengers to seek redress. It could pass through procedural mechanisms without sweeping legislation.¹⁵⁴ As alternatives to a ban or a PBOR, the Canadian, German, and British systems are compromise solutions that would balance airline and passenger interests. A bill to implement one of these systems might even gain industry support. This section briefly describes each country's dispute resolution methods¹⁵⁵ and regulatory and statutory passenger protections,¹⁵⁶ evaluates their strengths and weaknesses, and discusses their potential fit for the United States.

1. Canada

The Canadian Transportation Agency (CTA), Canada's transportation regulatory body, resolves airline-passenger disputes and regulates the industry. The Canada Transportation Act empowers the CTA to assume

¹⁵⁰ See Sarah Binder & Bill Frenzel, *The Business of Congress After September 11*, 1 BROOKINGS POL'Y. DIALOGUE 1, 2 (Feb. 2002).

¹⁵¹ See generally S. 678, *supra* note 144; H.R. 1303, *supra* note 144; S. 213 *supra* note 144, H.R. 624, *supra* note 144, H.R. 729, *supra* note 144.

¹⁵² See generally S. 2341, *supra* note 144.

¹⁵³ *Statistics and Historical Comparison*, GOVTRACK (2021), <https://www.govtrack.us/congress/bills/statistics>.

¹⁵⁴ See *infra* note 202 (discussing the possibility of creating an ADR system though an omnibus rider).

¹⁵⁵ For the purposes of this paper, "dispute resolution" means each country's methods of resolving disputes between airlines and passengers. This includes national courts, private arbitration, agency adjudication, negotiated settlement/mediation, etc.

¹⁵⁶ For the purposes of this paper, "regulatory passenger protections" refers to regulations promulgated by an administrative agency which may bring an enforcement proceeding against the airline for violating them. "Statutory passenger protections" refers to legislation such as E.U. Regulation 261 or Passenger Bill of Rights that outlines passenger rights and creates a cause-of-action for passengers to enforce them.

both judicial and regulatory functions,¹⁵⁷ and grants the Agency broad adjudicatory power. The dispute-resolution process begins when an aggrieved passenger files a complaint with their airline. If this initial complaint cannot achieve the passenger's desired result, they may choose to involve the Agency.¹⁵⁸ The CTA allows the consumer to choose between three different dispute resolution mechanisms, beginning with an informal facilitation and mediation at the initial stage and proceeding to an adjudication if the consumer is still unsatisfied.¹⁵⁹ The facilitation and mediation stages provide a structured environment for negotiation between the airline and passenger, in which the agency can advise a settlement but cannot decide the merits of the case.¹⁶⁰ Though the CTA encourages consumers to proceed to a mediation, it cannot require that they do so.¹⁶¹ After the facilitation and mediation steps, adjudication affords passengers at least one opportunity to present their cases to an impartial factfinder before they must pay court costs.¹⁶² This system gives claimants significant freedom of choice in deciding how far they wish to take their claim, as the Agency cannot reject a complaint on the merits before the adjudication step.¹⁶³ Additionally, these remedies are available nearly cost-free.¹⁶⁴

Though the CTA is heavily involved in resolving airline-passenger disputes, its regulatory passenger protections (and its power to enforce those provisions) are relatively weak. Canada's APPR regulations contain protections for overbooking, tarmac delays, and other frequent passenger frustrations, and are directly incorporated into airlines' CCs, which allows passengers to enforce any APPR provision through the normal complaint process.¹⁶⁵ Notably, the APPR regulations do *not* require that airlines

¹⁵⁷ See CAN. TRANSP. AGENCY, ANNUAL REPORT 2019-2020 (2020) at 8.

¹⁵⁸ *Know Your Rights*, CAN. TRANSP. AGENCY: AIR PASSENGER PROTECTION, <https://rppa-appr.ca/eng>.

¹⁵⁹ See *id.*

¹⁶⁰ See *Resolution of Disputes through Mediation – A Resource Tool*, CAN. TRANSP. AGENCY: PUBLICATIONS, <https://www.otc-cta.gc.ca/eng/publication/resolution-disputes-through-mediation-a-resource-tool> (“A neutral and impartial Mediator will assist the parties in negotiating a mutually satisfactory settlement themselves – the mediators have no decision making powers.”).

¹⁶¹ See CAN. TRANSP. AGENCY, ANNUAL REPORT 2019-2020, *supra* note 157, at 8.

¹⁶² Adjudicators may assign costs at their discretion. However, these costs must be “reasonable.” See *Rule 36.2: Request to Withdraw Application*, CAN. TRANSP. AGENCY: ANNOTATED DISPUTE RESOLUTION RULES, <https://otc-cta.gc.ca/eng/publication/annotated-dispute-adjudication-rules>.

¹⁶³ See CAN. BAR ASSN. AIR & SPACE L. SECTION., REG. MODERNIZATION FOR AIR TRANSP. (2017) 4.

¹⁶⁴ See *id.* (“Unlike other administrative tribunals, there are no fees or cost implications for passengers to bring a complaint to adjudication to discourage frivolous, ineligible or vexatious complainants.”).

¹⁶⁵ See *Sample Tariff – Notice to Readers*, CAN. TRANSP. AGENCY, <https://otc-cta.gc.ca/eng/sample-tariff-notice-readers> (“Pursuant to the CTA, the carrier's obligations under the provisions of the APPR are deemed to form part of the terms and conditions set out in the

refund passengers for canceled flights, even when those cancellations are entirely within the airline's control.¹⁶⁶ During the early days of the Covid-19 crisis, when other national enforcement agencies threatened action against airlines that failed to refund passengers,¹⁶⁷ the CTA maintained that airlines only needed to provide travel credits.¹⁶⁸ Even though it has ostensibly changed its position in response to public pressure,¹⁶⁹ the CTA's proposed new regulations *still* allow airlines to offer vouchers or travel credits in many circumstances.¹⁷⁰ This may have emboldened Canadian airlines to defy other countries' refund requirements. At least one Canadian carrier, Air Canada, has continued to deny cash refunds to U.S. passengers, spurring the DOT to take strong enforcement action against it.¹⁷¹

i. Evaluating the Canadian Model

The Canadian model succeeds in providing an affordable and accessible method for passengers to settle disputes with airlines, but a weak regulatory regime and inefficiency in resolving claims hamper its effectiveness. Canada has succeeded in resolving passenger complaints out of court and resolving cases without adjudication. In its most recent yearly review, the CTA reported that, out of 9,143 processed complaints against 113 airlines, only 1% of complaints advanced past the facilitation and mediation stages.¹⁷² The low cost to consumers and ease of access have generated criticism that the system is too easy to abuse.¹⁷³ The Canadian Bar Association's Air and Space Law section complains that a large volume of claims, numerous dispute resolution methods, low staffing, and lack of

carrier's tariff, unless carriers provide more advantageous terms and conditions.").

¹⁶⁶ See Emily Jackson, *Refunds or vouchers for cancelled flights? Canada's airlines at odds with U.S., Europe*, NAT'L POST (May 14, 2020) ("Canada's air passenger protection regulations require airlines to ensure customer can complete their trips when flights are cancelled for reasons outside the airlines' control, but they do not mandate refunds in such circumstances.").

¹⁶⁷ See ENFORCEMENT NOTICE REGARDING REFUNDS BY CARRIERS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL, U.S. DEPT. TRANSP. (Apr. 3, 2020).

¹⁶⁸ *Statement on Vouchers*, CAN. TRANSP. AGENCY (Mar. 25, 2020), <https://otc-cta.gc.ca/eng/statement-vouchers>.

¹⁶⁹ See Jacob Lorinc, *An Airline Lobbyist May Have Influenced the Government's Decision on Refunding Passengers, Quebec MP Charges*, TORONTO STAR (Jun. 17, 2021), <https://www.thestar.com/business/2021/06/17/an-airline-lobbyist-may-have-influenced-the-governments-decision-on-refunding-passengers-quebec-mp-charges.html>.

¹⁷⁰ See *Highlights of Proposed Airline Refund Requirements*, CAN. TRANSP. AGENCY, <https://otc-cta.gc.ca/eng/highlights-proposed-airline-refund-requirements>.

¹⁷¹ See DEPT. OF TRANSP., OFFICE OF AVIATION CONSUMER PROTECTION INITIATES ENFORCEMENT PROCEEDING SEEKING APPROXIMATELY \$25 MILLION AGAINST AIR CANADA FOR EXTREME DELAYS IN PROVIDING REQUIRED REFUNDS (2021).

¹⁷² See CAN. TRANSP. AGENCY, ANNUAL REPORT 2019-2020, *supra* note 157 at 58.

¹⁷³ See CAN. BAR ASSN. AIR & SPACE L. SECTION., REG. MODERNIZATION FOR AIR TRANSP. (2017) 4.

dismissal mechanism before adjudication make the process “unduly cumbersome and inefficient.”¹⁷⁴ These criticisms have merit. In May 2020, the Canadian Broadcasting Corporation reported that the CTA had a two-year backlog of complaints before the pandemic even began.¹⁷⁵ As of October 2020, the Agency had still “failed to settle a single complaint . . . for cancelled flights since the onset of the . . . pandemic.”¹⁷⁶ The CTA’s yearly report shows that it processed just over 9,000 claims in the 2019-2020 year but rolled 14,000 more over to the next year.

Even if the Canadian system did not have these downsides, it would be a poor fit in the United States. Permitting an administrative agency to adjudicate private contractual disputes between airlines and passengers would pose a significant constitutional issue. If Congress sought to vest the DOT with authority to adjudicate private claims for breach of airline CCs, it could not do so, because Article III reserves the power to enter final judgment on private common law claims of right to the judiciary.¹⁷⁷ But Congress may vest agencies with the power to adjudicate rights that *it* creates.¹⁷⁸ For a Canadian-style system of administrative adjudication to be workable in the U.S., Congress would need to create a broad statutory scheme defining rights and obligations between airlines and passengers that agencies could adjudicate. However, past efforts to statutorily define passenger rights have failed despite many members of Congress’s personal interests in the topic.¹⁷⁹ Therefore, this solution remains unlikely.

2. Germany

Germany’s Federal Aviation Office is only an enforcement body and does not adjudicate individual passenger claims.¹⁸⁰ However, Germany has created a robust Alternative Dispute Resolution (ADR) system to resolve airline-passenger disputes, involving both publicly funded and privately

¹⁷⁴ *Id.* at 4-5.

¹⁷⁵ Raisa Patel & Ashley Burke, *Canadian Transportation Agency Overwhelmed by 2-year Backlog of Air Passenger Complaints*, CBC NEWS. (May 31, 2020, 10:30 AM) <https://www.cbc.ca/news/politics/cta-overwhelmed-by-2-year-complaint-backlog-1.5592246>.

¹⁷⁶ Raisa Patel & Ashley Burke, *Canada’s Transport Regulator Hasn’t Settled a Single COVID-19 Flight Cancellation Complaint*, CBC NEWS. (Oct. 26, 2020, 3:00 AM) <https://www.cbc.ca/news/politics/211anadian-transportation-agency-cancelled-flight-complaints-1.5776622>.

¹⁷⁷ See *Stern v. Marshall*, 564 U.S. 462, 484 (2011). See also *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

¹⁷⁸ See *Oil States Energy Servs., LLC. v. Greene’s Energy Grp., LLC.*, 138 S. Ct. 1365, 1372-73 (2018).

¹⁷⁹ See *supra* notes 143-149 (discussing Congress’s longstanding interest in airline passenger rights and its previous failed attempts to create Passenger Bill of Rights legislation).

¹⁸⁰ See *Alternative Dispute Resolution in the Passenger Rights Sector*, EUROPEAN CONSUMER CENTRES NETWORK (2019).

funded ADR bodies.¹⁸¹ Germany's private ADR body, the Schlichtungsstelle für den öffentlichen Personenverkehr (SÖP), was the first that the government certified to resolve airline-passenger disputes.¹⁸² The German government requires airlines and passengers to participate in dispute resolution procedures for claims under €5,000.¹⁸³ It permits airlines to choose which ADR body they join, and most have chosen to join the SÖP.¹⁸⁴ Carriers pay a membership fee to join, and it is free to the consumer.¹⁸⁵ Like the Canadian CTA, a passenger can only invoke the SÖP's services if the airline does not respond to a direct complaint or provides an unsatisfactory answer.¹⁸⁶ The passenger submits an online claim to the SÖP, which reviews the case on its merits before deciding whether to accept it.¹⁸⁷ If the SÖP declines the claim, the passenger can take the issue to court. If the SÖP accepts, then the mediator gathers information from the airline, considers each side, and responds to the parties with a recommendation.¹⁸⁸ Though the parties often accept the mediator's recommendation, neither one is bound to it.¹⁸⁹ If either the claimant or the airline rejects the settlement, then the claimant may continue in court.¹⁹⁰

Germany and other E.U. countries have a broad regime of statutory passenger protections under EU Regulation 261/2004 ("EU 261"). Since its debut in 2004, EU 261 has greatly expanded the rights of passengers on European Airlines and traveling in E.U. countries. The regulation endows European passengers with "the highest standard of consumer protection in the world,"¹⁹¹ creating a robust statutory regime that provides several protections, including assistance in the case of disruption, and compensation and rebooking for canceled flights.¹⁹² EU 261 also creates a private right of action, and plaintiffs may bring claims under it in any E.U.

¹⁸¹ *Id.*

¹⁸² The SÖP is one of two major German ADR bodies that handles consumer complaints. The public ADR "Schlichtungsstelle Luftverkehr" hears ADR cases against airlines not affiliated with the SOP. *See id.* at 9. *See also* Claudia Hipp, *Conciliation Bodies as an Effective Tool for the Enforcement of Air Passenger Rights: Examination of an Exemplary Model in Germany*, 11(2) INT'L. J. TRANSP.& VEHICLE ENG'G. 509 (2017).

¹⁸³ *See* Hipp, *supra* note 182 at 511.

¹⁸⁴ *See id.* at 511-12.

¹⁸⁵ *See id.* at 512.

¹⁸⁶ *See id.* at 511.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See The Conciliation Procedure*, SÖP, <https://soep-online.de/en/the-conciliation-procedure/>.

¹⁹⁰ *See* Hipp, *supra* note 182, at 512.

¹⁹¹ *See* Sarah Jane Fox & Luis Martin-Domingo, *EU Enforcement Mechanisms: Passenger Rights and EC Regulation 261/2004*, 43 ANNALS OF AIR & SPACE L. 167, 169-70 (2018).

¹⁹² *Id.* at 174.

member state's national courts.¹⁹³ However, scholars and consumer rights advocates have criticized the regulation for its “weak, decentralized enforcement regime” and reliance on national regulatory bodies, which often cannot effectively sanction airlines for violating its protections.¹⁹⁴

i. Evaluating the German Model

The German dispute resolution system resembles the Canadian one in several key respects – passengers must first bring their claim directly to the airline before the mediation body intervenes, and the mediation body can recommend, but not actually adjudicate, a case's disposition.¹⁹⁵ Germany's system is more exportable to the United States than Canada's, since it uses private mediation bodies, which already operate in certain U.S. industries¹⁹⁶ and do not implicate the same constitutional concerns. Germany's system would still pose some issues if it existed in the U.S. Because SÖP recommendations are not binding on the parties, they would be toothless in the U.S. system. Unlike U.S. courts, German courts operate under a “loser pays” system.¹⁹⁷ If a German airline rejects the SÖP's recommendation when it is likely to lose on the merits, a consumer can take the airline to court and recoup legal fees and costs. But in the United States, that consumer would still need to pay their own legal fees and court costs regardless of the outcome, which would likely make the claim unviable, given the cost of airline tickets. Therefore, no U.S. airline would have an incentive to accept the mediator's recommendation, since there would be little threat of the consumer pursuing the claim in court.

3. United Kingdom

The United Kingdom has retained E.U. 261 after Brexit, and has the same basic passenger rights regime as Germany.¹⁹⁸ Its dispute resolution mechanisms are largely similar as well, with two key differences: 1) the Civil Aviation Authority (CAA)'s advisory role in helping passengers file claims with foreign airlines, and 2) the binding effect of ADR decisions.¹⁹⁹

¹⁹³ *Id.*

¹⁹⁴ See Sarah Drake, *Delays, Cancellations, and Compensation: Why are Passengers Still Finding it So Difficult to Enforce Their E.U. Rights Under Regulation 261/2004?* 27 MAASTRICHT J. EUR. & COMP. L. 230, 234 (2020).

¹⁹⁵ See EUR. CONSUMER CTR. NETWORK ALTERNATIVE DISPUTE RESOLUTION IN THE AIR PASSENGER RIGHTS SECTOR, 2019, at 8.

¹⁹⁶ See *Alternative Dispute Resolution*, WEX, <https://www.law.cornell.edu/wex/alternativedisputeresolution>.

¹⁹⁷ *Germany: Costs*, DLA PIPER: GLOBAL LITIGATION GUIDE, <https://www.dlapiperintelligence.com/litigation/insight/index.html?t=09-costs&c=DE>.

¹⁹⁸ See *U.K. Regulations*, CIVIL AVIATION AUTHORITY, <https://info.caa.co.uk/uk-regulations/>.

¹⁹⁹ Unlike Germany's system, British ADR bodies charge a nominal €25 fee to losing plaintiffs. See CIVIL AVIATION AUTHORITY, *ADR IN THE AVIATION SECTOR – A FIRST*

Like the German Federal Aviation Office, the CAA is solely an enforcement body, with no adjudicatory powers. However, the U.K. Parliament has empowered the CAA to approve ADR bodies²⁰⁰ and facilitate consumers' claims against airlines that are not members of these organizations. Though the CAA does not have the power to obtain individual redress for claimants, it can advise consumers on the merits of their claims and communicate between the consumer and the airline.²⁰¹ This function resembles the Canadian "facilitation" process, but only applies to a subset of carriers for which ADR is unavailable.

The second major difference in the U.K. system is that ADR decisions are binding on the airlines.²⁰² Consumers may reject ADR body decisions and bring their claims in court, but airlines must accept the mediator's ruling. Airlines opposed this aspect of the system, claiming that it would lead to "double adjudication" and encourage claimants to forum-shop if the ADR mediator's decision was unsatisfactory.²⁰³ Still, even though the United Kingdom has a "loser pays" system like Germany, ADR has become popular among major U.K. airlines despite the binding decisions. As of May 2019, nine of the ten largest U.K. carriers had joined one of the country's two primary aviation ADR bodies.²⁰⁴ During the CAA's first-year review of the program, it observed that airlines were generally satisfied with the ADR process, and viewed it as a cheaper, more efficient, and more final process than going to court.²⁰⁵ U.K. airlines' experience with the program suggests that carriers may accept the tradeoff of binding decisions for the benefits that ADR offers.

VI. IMPLEMENTING POLICY RESPONSES TO CLASS ACTION WAIVERS

Why might a British-style private ADR system be a better solution to the class action waiver problem than bans or broad consumer-rights protections? I offer two justifications. First, a bill that authorizes an ADR system for airline-passenger disputes would be an easier sell to Congress than a sweeping PBOR, and more permanent and effective than a DOT ban on class action waivers. Second, resolving airline-passenger disputes through individual ADR is more consistent with the ADA's legislative scheme than large-scale class action suits.

REVIEW, 2017, at 23.

²⁰⁰ *See id.*

²⁰¹ *See How the CAA Can Help*, CIVIL AVIATION AUTHORITY, <https://www.caa.co.uk/Passengers/Resolving-travel-problems/How-the-CAA-can-help/How-the-CAA-can-help/>.

²⁰² *See Rule 8.2, "Airline" Scheme Rules*, AVIATIONADR (2021). *See also Rule 4.5.4, CEDR Adjudication Scheme Rules*, CEDR SERVICES, LTD. (2021).

²⁰³ *See ADR IN THE AVIATION SECTOR: A FIRST REVIEW*, *supra* note 199 at 25.

²⁰⁴ *See id.*

²⁰⁵ *See id.*

Industries do not like regulation. But they do like arbitration.²⁰⁶ More specifically, defendant businesses value the predictability, expediency, and cost savings that arbitration offers.²⁰⁷ Liability exposure and settlement pressure are far lower in arbitration.²⁰⁸ ADR systems offer airlines many of the same benefits that arbitration provides.²⁰⁹ U.K. airlines have largely embraced ADR.²¹⁰ In Germany, airlines initially opposed it,²¹¹ but quickly changed positions. The same would likely happen in the United States. Several U.S. carriers already participate in European ADR bodies for disputes arising out of their transatlantic flights.²¹² Furthermore, mass cancellation events like Southwest's recent systemwide meltdown subject airlines to significant liability exposure if class action waivers fail.²¹³ Even if these waivers successfully prevent class certification, airlines face uncertain litigation costs. A solution like arbitration, which could reduce these risks and give carriers more certainty than litigation, may be an easier sell than a widespread consumer-rights enforcement regime or a categorical ban on certain contractual terms.

Establishing an ADR system may not just be an easier sell to the industry than a PBOR or a prohibition on class action waivers. It may also be easier to pass through Congress. A member could insert a narrow provision authorizing the DOT to "certify private ADR bodies to mediate legal claims between passengers and airlines" as a policy rider into an omnibus spending bill.²¹⁴ This workaround would give passengers a new right to recourse without requiring a broad piece of legislation that is

²⁰⁶ See DOUGLAS SHONTZ ET AL., BUSINESS TO BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL 7-9 (2011).

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See ADR IN THE AVIATION SECTOR: A FIRST REVIEW, *supra* note 199 at 25. See also Hipp, *supra* note 182 at 512.

²¹⁰ See, e.g., notes 198-200.

²¹¹ Compare Hans-Georg Bollweg, *Alternative Dispute Resolution (ADR) in the Aviation Sector in Germany*, 62 GERMAN J. OF AIR & SPACE L. 398, 403 (2013) with Hipp, *supra* note 182 at 511. ("It was recognized that in these typical cases with a low amount in dispute and many similar and relatively simple cases, ADR can help to solve these conflicts effectively.")

²¹² See *Alternative Dispute Resolution*, CIVIL AVIATION AUTHORITY, <https://www.caa.co.uk/passengers/resolving-travel-problems/how-the-cao-can-help/alternative-dispute-resolution/>.

²¹³ See Kyra Honkanan, *Not Flying Solo: How Southwest's Massive Flight Cancellations Led to Several Class Action Lawsuits*, MINN. L. REV. (2023) <https://minnesotalawreview.org/2023/02/20/not-flying-solo-how-southwests-massive-flight-cancellations-led-to-several-class-action-lawsuits/>.

²¹⁴ ROBERT KEITH, CONG. RSCH. SERV., RL30619, EXAMPLES OF LEGISLATIVE PROVISIONS IN ANNUAL APPROPRIATIONS ACTS 4 (2016). (noting that "[t]he inclusion of legislative provisions in annual appropriations acts has been a long-standing feature of the appropriations process" and providing examples of legislative provisions enacted as policy riders.")

unlikely to pass. Alternatively, airlines could privately create an arbitration system if the DOT relaxed its prohibition on forum-selection clauses in CCs. Consumers may perceive private arbitration to be unfriendly to their interests.²¹⁵ However, the E.U.'s success with ADR may persuade the DOT to allow airlines to include arbitration or dispute mediation clauses in their CCs, as Spirit did before the DOT issued its current rule.²¹⁶

ADR is more consistent with ADA's text and spirit than class actions. The purpose of the ADA is to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services."²¹⁷ A centralized, efficient regulatory regime is central to these goals, and individual state regulations would undermine them. But class actions have a regulatory nature. Plaintiffs' lawyers function as private attorneys general.²¹⁸ Class actions represent unique form of "public-private collaboration" where "the private class action augments the public administration of the laws."²¹⁹ The class action mechanism itself creates this regulatory effect by "pool[ing] the stakes" in the case.²²⁰ Furthermore, other federal agencies have acknowledge that private enforcement is a "necessary supplement" to their regulatory activities, because it guards against regulatory capture and sanctions misconduct where agencies cannot.²²¹ Thus, class actions impose an additional state-like piece of regulation on the airline industry. Even if a class action is unlikely to survive motions to dismiss, in the past, airlines have changed their policies and procedures in response to threatened lawsuits.²²² Therefore, the specter of litigation uses state law – in this case, state common law – to regulate airline conduct. ADR avoids this inefficiency. It affords individual plaintiffs meaningful relief without the liability exposure and settlement pressure that give class actions their regulatory effect. Therefore, it is ultimately more faithful to the ADA's goal of broad deregulation and reliance on market forces than a class action.

²¹⁵ See generally Aaron Blumenthal, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699 (2015).

²¹⁶ See Exhibit 7, *supra* note 7 at 38.

²¹⁷ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 95 Stat. 1705.

²¹⁸ William Rubenstein, *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129, 2148 (2004).

²¹⁹ Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L. J. 369, 380 (2012).

²²⁰ See Rubenstein, *supra* note 218, at 2147. See also Issacharoff, *supra* note 219, at 379.

²²¹ Issacharoff, *supra* note 219, at 381.

²²² See, e.g., Brendan Pierson, *United Faces Pressure to Settle Quickly with Passenger – Lawyers*, REUTERS (Apr. 13 2017, 9:42 AM), <https://www.reuters.com/article/uai-passenger/united-faces-pressure-to-settle-quickly-with-passenger-lawyers-idINL1N1HL0MA>.

VII. CONCLUSION

Class action waivers are a new phenomenon. But they are likely here to stay. Airlines' rapid adoption of these terms, their exculpatory nature, and a lack of economically feasible alternatives harm plaintiffs' ability to obtain relief. However, high liability exposure may drive carriers to settle if plaintiffs successfully defeat these waivers. A U.K.-style alternative dispute resolution mechanism is a promising solution and could effectively balance the interests of airlines and passengers.